BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Opinion of the Court Below.

The official report of the findings, decision and opinion of the United States Court of Claims in this proceeding has not as yet been published.

II. Jurisdiction.

This Court has jurisdiction to review the judgment below under Section 288b of the Judicial Code as amended May 22nd, 1939, Chapt. 140, 53 Stat. 752.

III. Statement of the Case.

During the period involved in the present case petitioner was engaged in refining sugar in the Philippine Islands and selling its refined product both in the Philippine Islands and in the United States. Balfour, Guthrie & Co. Ltd. was agent for petitioner in the United States, with its principal office at San Francisco and branch offices located in Los Angeles, Seattle, Portland and Tacoma.

On June 8, 1934, when the floorstock tax became applicable, plaintiff, through its agent, Balfour, Guthrie & Co. Ltd. had in its possession in the United States, 521,203 bags of refined sugar.

Of this total, 91,422 was subject to certain contracts with manufacturers made prior to April 25, 1934, and therefore not subject to floorstock tax.

Of the remainder, 435,898 bags were sold between June 8, 1934 and April 1, 1935. No other sugar was shipped by the petitioner to its agent Balfour during this period so that the identity of the sugar sold was clear.

Although the tax attached to floorstocks held at the first moment of June 8th, it was not payable until the taxed sugar was sold.

The current market prices of petitioner's sugar at the various offices of Balfour, Guthrie on June 7, 1934, immediately prior to the time when the floorstock tax took effect was as follows:

Los Angeles	$4.001 per 100 lb. bag
Portland	4.022 " " " "
San Francisco	3.92 " " " "
Seattle and Tacoma	4.11 " " " "

The aggregate market value of petitioner's taxable floorstock on June 7, 1934 was $1,752,343.69. Plaintiff sold said floorstock for $1,937,233.88 after having paid a tax of $233,203.83. The total which petitioner received for its floorstock after appropriate adjustments, was $59,466.10 less than its June 7 value plus the tax.

Prior to the imposition of the floorstock tax petitioner's operations had been profitable and an audit made by the income tax representatives of the respondent showed that for the fiscal year ended September 30, 1933, petitioner earned a profit amounting to $359,522.94.

For the fiscal year ended September 30, 1934, during the first three months of which petitioner was paying floorstock tax, its profit declined to $139,122.68 and for the combined fiscal periods ending November 30, 1935, it sustained a loss of $56,763.09.

IV. Specifications of Errors.

1. The Court of Claims erred in holding that it was necessary for petitioner to prove that it received less for its floorstock than cost plus the tax paid thereon in order to establish that it bore the burden of the floorstock tax.

2. The Court of Claims erred in failing and refusing to hold that petitioner had borne the burden of the tax to the extent that the sales prices at which its floorstock was sold

were less than current market prices on June 7th, plus the tax.

V. Summary of Argument.

A. Proof that cost plus the tax exceeds sales price does not show whether the tax was absorbed or passed on.

B. Interpreting Section 902 as forbidding refunds to taxpayers operating at a profit and authorizing them only to taxpayers sustaining losses would make that provision arbitrarily discriminatory and therefore unconstitutional.

C. Petitioner has established that it bore the burden of the tax by proving that its sales prices failed to reimburse it for the value of its floorstock on the day the tax attached and for the amount of the tax.

ARGUMENT.

A. Proof that cost plus the tax exceeds sales price does not show whether the tax was absorbed or passed on.

The Court of Claims erroneously held:

> "Unless it (the plaintiff) shows at least that it has not recovered its cost plus tax, it has not sufficiently carried the burden of showing that it itself paid the tax and did not pass it on to its customers."

Failing to "recover costs plus tax" is to sell at a loss. Hence the decision below is a holding that only taxpayers who sold their floorstock inventory at a loss are entitled to refunds.

The President's Cabinet Committee Report on the Textile Industry, 74th Congress, 1st Session, Senate Document No. 126 (Aug. 1935), at page 141, makes it clear that this theory is wholly unsound:

> "Profits or losses for individual processors are, however, in themselves no proof that the processing

> tax has been passed on. For many years large numbers of establishments have been operating at losses and gradually going out of business. This situation would remain unchanged if all mills passed on the full amount of the processing tax. To argue that losses indicate failure to pass on the processing tax is tantamount to arguing that any loss which a mill may sustain should be ascribed to the processing tax."

The fallacy in this theory also has been pointed out in *Arkwright Mills* v. *United States, supra* (Appendix, p. 18):

> "Defendant also suggested that plaintiff's costs should have been shown, in order to test whether the sales resulted in profit or not. The question of whether plaintiff made a profit or a loss is beside the point. It could have had costs far above the July 31 market price, but have been able to sell for the July 31 price plus the amount of the tax, thus shifting the tax although sustaining a loss, or, vice versa, it could have expected a profit of more than the amount of the tax out of the July 31 prices, and have absorbed the tax by foregoing part of that profit, and still have had some profit after absorbing the whole burden of the tax."

This Court has sustained the constitutionality of Section 902 (Appendix 12, on the ground that a plaintiff to recover in litigation may properly be required to prove that he has been damaged. *Anniston Manufacturing Co.* v. *Davis, supra.*

Clearly, if the taxpayer sold his floorstock at no greater loss after paying the tax than before, he has not been damaged.

On the other hand, if a taxpayer has been operating at a profit and that profit is reduced by the tax, he has been injured as clearly as in the case where the tax causes him to sell at a greater loss *C. B. & Son Mfg. Co.* v. *United States, supra.*

To adopt the rule applied by the Court below would be to deny to taxpayers the right to recover any unconstitutional tax unless they were operating at a loss. This is tantamount to according the protection of the constitution to those taxpayers operating at a loss and to denying it to those taxpayers whose operations are profitable.

B. Interpreting Section 902 as forbidding refunds to taxpayers operating at a profit and authorizing them only to taxpayers sustaining losses would make that provision arbitrarily discriminatory and therefore unconstitutional.

Cost in the case of one taxpayer may be substantially below or above the cost of another taxpayer. The reason for the difference may be efficiency in operation, volume, financial strength or mere chance. The floorstock tax could not be responsible for or related to such vicarious variations in cost.

Petitioner submits that the granting of refunds of floorstock taxes to those taxpayers receiving less than cost but denying recovery to taxpayers whose operations were profitable would constitute an arbitrary and unreasonable discrimination. If Section 902 authorized such a result it would clearly be unconstitutional. *Frew* v. *Bowers*, 11 F. (2d) 625; *Nichols* v. *Coolidge*, 274 U. S. 531.

An interpretation making the statute unconstitutional should be avoided. In *Anniston Manufacturing Co.* v. *Davis, supra,* this Court construing this specific statutory provision said:

> "Despite the broad language of Section 902, we do not think that it should be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it. We apply the familiar canon which makes it our duty, of two possible constructions to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the

Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law.' Federal Trade Commission *v.* American Tobacco Company, 264 U. S. 298, 307, 44 S. Ct. 336, 337, 338, 69 L. Ed. 696, 32 A. L. R. 786; Panama R. R. Co. *v.* Johnson, 264 U. S. 375, 390, 44 S. Ct. 391, 395, 68 L. Ed. 748; Blodgett *v.* Holden, 275 U. S. 142, 276 U. S. 594, 48 S. Ct. 105, 107, 72 L. Ed. 206."

C. Petitioner has established that it bore the burden of the tax by proving that its sales prices failed to reimburse it for the value of its floorstock on the day the tax attached and for the amount of the tax.

Pre-tax market value is the only sound and accurate measure by which to determine the effect of the imposition of the tax, whether it has been passed on or absorbed. This market value on the date the floorstock tax took effect is the same in the case of all taxpayers. If the pre-tax value is higher than the cost, it represents accrued appreciation, unrelated to the tax, which petitioner is entitled to recover. If it is lower than cost, the difference represents a loss, equally unrelated to the tax, which should not give the taxpayer a right to preferential treatment.

In *Arkwright Mills* v. *United States, supra*, the Court held that this pre-tax market value was controlling. The Court there said (Appendix, p. 17):

> "Whether a tax burden is absorbed or shifted must be judged by what happened, not by what was hoped for. If the market refused to take goods *at pre-tax prices plus tax*, and prices had to come down to pre-tax prices plus part of the tax, then the burden of only that part was shifted to the purchasers. They cannot be said to have borne the burden of anything they refused to pay for." (Italics supplied.)

The decision of the Circuit Court of Appeals for the Seventh Circuit in *C. B. Cone & Son Mfg. Co.* v. *United States,*

supra, is to the same effect. The taxpayer there sold its floorstock at an increased price after the tax took effect, but the increase was not sufficient to cover both the higher raw material cost and the floorstock tax.

The Court held the taxpayer had absorbed the tax in spite of this increase, basing it on the following reasoning (p. 532, 534):

> "This argument, on its face, appears rather plausible, but it ignores the real question in controversy, that is, whether *plaintiff's selling price* should be compared with *its cost price* as defendant contends, or whether it should be compared with *its replacement cost* (*less processing tax*) as plaintiff contends. * * *
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> "Both sides cite and quote from Anniston Manufacturing Co. *v.* Davis, 301 U. S. 337. As we read this case it throws little, if any, light upon the instant situation. It is true the court held the refund statute constitutional and discussed the various paragraphs thereof. It also held that the claimant must show '* * * where it can be shown, that he alone has borne the burden of the invalid tax and has not shifted it to others.' These matters are not in dispute here. It may be pertinent, however, to note the reason given by the court for requiring such a showing on the part of the claimant. The court, on page 348, said:
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> > '* * * While the taxpayer was undoubtedly hurt when he paid the tax, if he has obtained relief through the shifting of its burden, he is no longer in a position to claim an actual injury and the refusal of a refund in such a case cannot be regarded as a denial of constitutional right.'
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> "Applying such pronouncement to the instant situation, we do not see how it can be logically contended that plaintiff has obtained relief through the shifting of its burden merely by increasing its selling price so as to permit recovery of the actual market value of its product. *The position of the defendant and the de-*

cision of the court below would require the plaintiff to forego the recovery of a sufficient portion of the increased value of its product to make room for the inclusion of the tax. It is our opinion that such a requirement results in an actual injury to the plaintiff, as real as though he were being deprived of his property for less than its fair market value." (Italics supplied)

Conclusion.

This petitioner in this proceeding has proved that it was obliged to dispose of its floorstock for less than its June 7th value plus the tax. It bore the burden of the tax to the extent of the deficiency.

The petition for certiorari should be granted.

Respectfully submitted,

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